

THE COBEAGA LAW FIRM

ATTORNEYS & COUNSELORS AT LAW
550 East Charleston Blvd., Suite D
Las Vegas, Nevada 89104
Tel (702) 240-2499
Fax (702) 240-2489

1 **MLIM**
J. MITCHELL COBEAGA, ESQ.
2 Nevada Bar No. 0177
THE COBEAGA LAW FIRM
3 550 East Charleston Blvd. Suite D
Las Vegas, Nevada 89104
4 Telephone: (702) 240-2499
Facsimile: (702) 240-2489
5 *Attorneys for Defendant*

6
7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**

9 SUSIE LEAHY, individually and SUSIE
LEAHY AS GUARDIAN AD LITEM FOR
10 REBECCA SUSAN LEAHY, a minor,
HANNAH JOY LEAHY, a minor, and
WILLIAM JOHN LEAHY, III, a minor,

11 Plaintiffs,

12 vs.

13 LONE MOUNTAIN AVIATION, INC., a
14 corporation; and DOES 1 through 20,
15 inclusive,

16 Defendants

CASE NO: 2:10-CV-00082 -GMN-PAL


17 **DEFENDANT LONE MOUNTAIN**
AVIATION, INC.'S MOTION IN
LIMINE TO INTRODUCE EVIDENCE OF
PLAINTIFF LEAHY'S REMARRIAGE.

18 Defendant LONE MOUNTAIN AVIATION, INC., by and through its counsel of record,
19 J. MITCHELL COBEAGA, ESQ. of the law firm, THE COBEAGA LAW FIRM, hereby
20 submits its Motion in Limine to introduce evidence of Plaintiff SUSIE LEAHY-HERR's
21 remarriage and name change.

22 This Motion is made and based on the attached Memorandum of Points and Authorities,
23 all pleadings and papers on file herein and any oral argument this Court may entertain.

24 DATED this 25TH day of January, 2013.

25 THE COBEAGA LAW FIRM

26 
27 J. MITCHELL COBEAGA, ESQ.
Nevada Bar No. 0177
550 E. Charleston Blvd., Suite D
Las Vegas, NV 89104
28 Attorney for Defendant

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendant LONE MOUNTAIN brings the instant Motion, pursuant to FRE 401-403,
3 seeking a determination from the court regarding the admissibility of Plaintiff LEAHY-
4 HERR's remarriage and name change where she is seeking to prove damages arising out of loss
5 of support, companionship, etc. The substantive right to damages for this wrongful death
6 action arises statutorily under NRS 41.085(4), which states that decedent may be awarded
7 pecuniary damages for "grief or sorrow, loss of probable support, companionship, society,
8 comfort and consortium..."

9 **I.**

10 **FACTUAL AND PROCEDURAL OVERVIEW**

11 This case arises out of the crash of a small twin engine aircraft on August 28, 2008, near
12 the North Las Vegas Airport. The aircraft was piloted by William Leahy, the decedent in this case.
13 William Leahy had married co-plaintiff Mrs. Susan Leahy-Herr on June 17, 1995. At the time of
14 the accident, Mrs. Leahy-Herr worked for Veritas Christian Academy and continued working there
15 to support her three children following the crash. (Depo of Susan Leahy Herr, P.7, 22)

16 Mrs. Leahy-Herr met her current husband on Christianmingle.com in May of 2009. Mrs.
17 Leahy-Herr married Brian Herr on May 22, 2010, and they have subsequently had a son together.
18 Around the time of her remarriage, Mrs. Leahy-Herr quit her job at Veritas Christian Academy to
19 become a full-time mother and housewife. The time between the crash and Mrs. Leahy-Herr's
20 remarriage was less than two years. Mr. Herr is gainfully employed in a managerial position and
21 supports Mrs. Leahy-Herr.

22 Mrs. Leahy-Herr is seeking, inter alia, to be compensated "3. For loss of service and
23 support according to proof; 4. For loss of care, comfort and society according to proof."

24 ///

25 ///

26 ///

27 ///

28 ///

II.

STANDARD OF REVIEW

Motions in limine are designed to seek the Court's ruling on the admissibility of arguments, assertions and evidence in advance of trial. Motions in limine are the traditional vehicle for determining the admissibility of evidence and for pre-determination of the relevance of testimony or evidence. The admissibility of evidence at trial is generally governed by FRE 401, 402 and 403.

FRE 402 General Admissibility of Relevant Evidence: Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible.

FRE 403 Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons: The court may exclude relevant evidence if its probative value: is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

III.

LEGAL ARGUMENT

A wrongful death claim is purely a creature of statute since no such cause of action was recognized under the common law of any state. See *Hall v. Gillins*, 13 Ill.2d 26, 147 N.E.2d 352 (Ill. 1958) (Where the court explained the history of wrongful death statutes and denied damages not expressly authorized by the statute). Accordingly, a wrongful death claim tried in Nevada and arising from an accident occurring in Nevada is limited by the domestic wrongful death statute. That statute is NRS 41.085(4), which delineates authorized damages and reads in part:

4. The heirs may prove their respective damages in the action ... and the court or jury may award each person pecuniary damages for the person's grief or sorrow, loss of probable support, companionship, society, comfort and consortium...

Mrs. Leahy-Herr's remarriage is ultra-relevant here because it has an extremely strong tendency to make those facts applicable to Mrs. Leahy-Herr's damages "more or less probable," such as probable loss of support, companionship, etc. FRE 401.

///

THE COBEAGA LAW FIRM

ATTORNEYS & COUNSELORS AT LAW

550 East Charleston Blvd., Suite D

Las Vegas, Nevada 89104

Tel (702) 240-2499

Fax (702) 240-2489

1 Federal statutes or other rules prescribed by the Supreme Court do not exclude this
 2 evidence under FRE 402. Accordingly, unless the probative value of such evidence were
 3 substantially outweighed by one of the factors listed in FRE 403, the evidence of Mrs.
 4 Leahy-Herr's remarriage is admissible.

5 The Nevada Supreme Court has not decided a case directly addressing the
 6 admissibility of remarriage. States which have ruled on this issue have done so according
 7 to the damages and requisite proof under their domestic wrongful death statute. The
 8 Illinois statute, for instance, is more expansive and allows that "the jury may give such
 9 damages as they deem a fair and just compensation with reference to the pecuniary injuries
 10 resulting from such death, including damages for grief, sorrow, and mental suffering to the
 11 surviving spouse..." 740 ILCS 180/2.

12 The Courts of Appeals in Illinois opine that when a surviving spouse claims
 13 damages for loss of support, comfort and society, their remarriage signifies they are no
 14 longer at a loss for those elements and the amount of damages should be reduced. *Dotson*
 15 *v. Sears, Roebuck & Co.*, 557 N.E.2d 392, 394 (Ill. App. Ct. 1990). They further hold that
 16 "evidence of remarriage [is] relevant to a claim for loss of consortium because recovery [is]
 17 therefore limited to 'actual loss,' i.e., 'loss up to the time of the remarriage.'" *Id.* (citing
 18 *Carter v. Chicago & Ill. Midland Ry.*, 474 N.E.2d 458, 463 (Ill. App. Ct. 1985)).

19 In a wrongful death case in Mississippi, the court expressed similar reasoning.
 20 Testimony is proper to show the condition of the affected person, so it follows that
 21 "testimony may be introduced to show the remarriage of the widow, after the death of the
 22 husband." *Campbell v. Schmidt*, 195 So. 2d 87, 90 (Miss. 1967). The Fifth Circuit agreed
 23 in upholding a charge to the jury that when assessing damages sustained by the surviving
 24 wife, the jury may take into account her remarriage and its effect on damages she might
 25 otherwise be able to recover. *Nowell v. Universal Elec. Co.*, 792 F.2d 1310, 1313 (5th
 26 Cir. 1986). Wisconsin agreed, stating: "[t]he possibility of remarriage is always an element
 27 which it is proper for the jury to consider in determining damages in a wrongful death
 28 action." *Jensen v. Heritage Mut. Ins. Co.*, 127 N.W.2d 228, 234 (Wis. 1964).

THE COBEAGA LAW FIRM

ATTORNEYS & COUNSELORS AT LAW
 550 East Charleston Blvd., Suite D
 Las Vegas, Nevada 89104
 Tel (702) 240-2499
 Fax (702) 240-2489

Defendant concedes that Plaintiff Leahy-Herr suffered loss of comfort and support when her husband died on August 28, 2008. However, actual damages were mitigated when Plaintiff Leahy remarried on May 22, 2010. Once Sarah Leahy-Herr married Mr. Herr, she was no longer at a loss for support, comfort and society. Plaintiff may allege that damages should be calculated from the date of the injury and therefore evidence of her remarriage is irrelevant. A basic tenet of tort law says that one should only recover for injuries one actually suffers or is reasonably likely to suffer. A remarried plaintiff is no longer without the support, care, and comfort of a spouse. As such, those damages ceased at the time of the remarriage. *See, Carter*, 474 N.E.2d at 463. As Mrs. Leahy-Herr is seeking damages for loss of comfort and support, it is only proper to introduce evidence of how these damages were affected by Plaintiff's remarriage.

Even if evidence of remarriage were not allowed to mitigate damages, it would still be allowed to correct misimpressions created by the plaintiff. *See Elmahdi v. Ethridge*, 987 S.W.2d 366, 369 (Mo.App.1999) ("a defendant may mention the fact of the plaintiff's remarriage, although not the details about the new spouse's income or services, if necessary in order to correct a misimpression created by the plaintiff."). This is particularly true when, as here, the surviving spouse has changed her name as a result of the remarriage and quit her job to become a full-time homemaker. Withholding evidence of a remarriage from the jury "would not be consistent with the high standards of integrity which the judicial process should maintain." *Glick v. Allstate Ins. Co.*, 435 S.W.2d 17 (Mo. Ct. App. 1968); *see also, Harbenski v. Upper Peninsula Power Co.*, 325 N.W.2d 785 (Mich. Ct. App. 1982); *Dubil v. Labate*, 245 A.2d 177, 180 (N.J. 1968) ("[i]t would be offensive to the integrity of the judicial process if the plaintiff, after taking an oath to be truthful, were permitted to misrepresent her marital status to the jury"); and *Smyer v. Gaines*, 332 So. 2d 655 (Fla. App. 1976) (evidence of remarriage allowed to show the whole truth). Even if such evidence were not permitted during *voir dire* or opening statements, evidence of Mrs. Leahy-Herr's subsequent remarriage should be admitted to correct any affirmative misrepresentations by plaintiff. If Mrs. Leahy-Herr were to misrepresent her name, amount

1 of children, or that she is a single mother struggling to support her family, such evidence
 2 should be admitted to prevent a fraud on the jury. Allowing Ms. Leahy to conceal evidence
 3 and use her former name would equate to perjury. *See, Watson v. Fischback*, 301 N.E.2d
 4 303 (Ill. 1973).

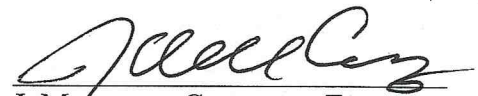
5 III.

6 CONCLUSION

7 This Court should follow the rules established by the foregoing courts and allow
 8 the introduction of evidence of Susan Leahy's remarriage to Brian Herr. By purposely
 9 keeping this fact from the jury the integrity of the court would be jeopardized. The jury
 10 should be introduced to all relevant evidence of damages. If Plaintiff Susan Leahy-Herr is
 11 to be awarded damages for loss of support, society and comfort, the jury should be able to
 12 make a determination as to what those damages were and what future damages are likely
 13 to be, not what they could have potentially been.

14 DATED this 25TH day of January, 2013.

15 THE COBEAGA LAW FIRM

16 

17 J. MITCHELL COBEAGA, ESQ.

18 Nevada Bar No. 0177

19 550 E. Charleston Blvd., Suite D

20 Las Vegas, NV 89104

21 Attorney for Defendant

THE COBEAGA LAW FIRM

ATTORNEYS & COUNSELORS AT LAW
 550 East Charleston Blvd., Suite D
 Las Vegas, Nevada 89104
 Tel (702) 240-2499
 Fax (702) 240-2489

CERTIFICATE OF SERVICE

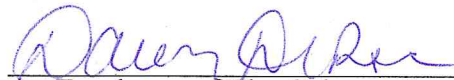
I hereby certify that on this 25th day of February, 2013, I caused to be served a true and correct copy of the foregoing DEFENDANT LONE MOUNTAIN AVIATION, INC.'S MOTION IN LIMINE TO INTRODUCE EVIDENCE OF PLAINTIFF LEAHY'S REMARRIAGE by electronic service (via Case Management/Electronic Case Filing). Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

Patrick E. Bailey, Esq.
 Keith A. LOVENDOSKY, ESQ.
 BAILEY & PARTNERS
 2800 28th Street, Suite 200
 Santa Monica, CA 90404-6203
 Fax: (310) 392-8091

James L. Pocrass, Esq.
 JAMES L. POCRASS LAW CORPORATION
 1875 Park East, Suite 1750
 Los Angeles, CA 90067
 Fax: (310) 550-9051

Jim Oronoz, Esq.
 LAW OFFICE OF JIM ORONoz
 815 S. Casino Center Blvd.
 Las Vegas, NV 89101
 Fax: (702) 474-1320

DATED this 25TH day of February, 2013.



An Employee of The Cobeaga Law Firm

H:\OPEN CASE FILES\1136.005\Pleadings\MILM REMARRIAGE - 2.wpd